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IN THE

Supreme Court of the United States

October Term, 1959

No. ~~609~~ 36

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,

Appellant

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA, and GEORGE J. JOSEPH, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA,

Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION TO AFFIRM

HARRY J. RUBIN
Attorney, Pennsylvania Department of Justice
WALLACE C. WORTH, JR.
First Assistant District Attorney of Lehigh County, Pennsylvania
ANNE X. ALPERN
Attorney General's Deputy Commonwealth of Pennsylvania
Attorneys for Appellees

Department of Justice
Commonwealth of Pennsylvania
Main Capitol Building
Harrisburg, Pennsylvania

Murrelle Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa.

INDEX TO BRIEF

	Page
Motion To Affirm	1
Statement	2
Argument	5
Conclusion	12

TABLE OF CITATIONS

Cases:

Commonwealth v. Brown, 346 Pa. 192	12
Crown Kosher Super Market of Mass., Inc. v. Gallagher, 176 F. Supp. 466 (D. Mass. 1959)	10
Friedman v. New York, 341 U.S. 907	3, 8, 9, 10
Grosliowiak v. Pennsylvania, 358 U.S. 47	3, 9
Gundaker Central Motors v. Gassert, 354 U.S. 933	3, 8
Hennington v. Georgia, 163 U.S. 299	3, 9,
Kald v. Ohio, 358 U.S. 132	3, 10
Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61	10, 11
Ohio ex rel. Eaton v. Price, 360 U.S. 246	9
Petit v. Minnesota, 177 U.S. 164	10
Sean Hing v. Crowley, 113 U.S. 703	9
State v. McGee, 346 U.S. 802	3, 8, 10
State v. Towery, 347 U.S. 925	8

Lisenba v. Ohio, 358 U.S. 131 9
Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 10
Yick Wo v. Hopkins, 118 U.S. 356 7

STATUTES:

United States:
28 U.S.C. 2281 2
28 U.S.C. 2284 2

Pennsylvania:
Act of May 28, 1937, Pamphlet Laws 1019, §66, 46 Pa. Stat. Ann. §566 12
Act of June 24, 1939, Pamphlet Laws 872, §699.4, 18 Pa. Stat. Ann. §4699.4 2, 3, 5, 7, 8, 9, 10, 11
Act of June 24, 1939, Pamphlet Laws 872, §201, 18 Pa. Stat. Ann. §5201 8
Act of August 10, 1959, Pamphlet Laws 660, adding §699.10 to the Act of June 24, 1939, Pamphlet Laws 872, 18 P.S. §4699.10 2, 3, 5, 6, 8, 9, 10, 11

AUTHORITY:

Note, *State Sunday Laws and the Religious Guarantees of the Federal Constitution*, 73 Harv. L. Rev. 729 (1960) 12

IN THE
SUPREME COURT OF THE UNITED STATES

No. 699 October Term, 1959

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,

Plaintiff-Appellant

v.

PAUL A. McGINLEY and GEORGE J. JOSEPH,

Defendants-Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final order of the District Court be affirmed on the ground that the questions are so insubstantial as not to warrant further argument.

STATEMENT

Plaintiff filed its complaint in the present proceeding on November 22, 1958. It alleged (1) that the Pennsylvania Sunday Law of 1939 (Act of June 24, 1939, "The Penal Code", Pamphlet Laws 872, §699.4, 18 Pa. Stat. Ann. §4699.4) is unconstitutional as (a) a law respecting the establishment of religion and (b) a law unreasonably discriminatory on its face and (2) that aside from the unconstitutionality of the law itself, the defendant Paul A. McGinley, then District Attorney of Lehigh County, Pennsylvania, had enforced the law in a discriminatory fashion. Plaintiff applied for and received a temporary restraining order pursuant to 28 U.S.C. §2284 at the time of filing.

Since the plaintiff sought injunctive relief and alleged the unconstitutionality of the state statute, a three-judge district court was required. 28 U.S.C. §2281. This court was subsequently designated pursuant to 28 U.S.C. §2284.

On August 10, 1959, the General Assembly of Pennsylvania enacted Act No. 212 of its 1959 Session (Act of August 10, 1959, Pamphlet Laws 660, 18 Pa. Stat. Ann. §4699.10). This Act was not an amendment to the act cited above to 18 Pa. Stat. Ann. §4699.4, but an addition to the Penal Code of June 24, 1939, itself. Pursuant to the agreement of the parties, plaintiff then filed an amended complaint attacking the constitutionality of this new statute as well.

Following trial and argument, the District Court on December 1, 1959, handed down its opinion. By a two to one vote it denied any relief to plaintiff, holding

(1) that it need not determine the constitutionality of §699.4 of "The Penal Code" of 1939, 18 Pa. Stat. Ann. §4699.4, since the 1959 Act, adding §699.10 to "The Penal Code", 18 Pa. Stat. Ann. §4699.10, probably superseded the earlier section in so far as plaintiff's activities were concerned;

(2) that the decision of this Court in *Friedman v. New York*, 341 U. S. 907, indicated adherence by this Court to the doctrine of *Hennington v. Georgia*, 163 U. S. 299, that Sunday laws were civil regulations and presented no establishment of religion issue;

(3) that nothing in the 1959 Pennsylvania statute justified treating it differently from the New York statute sustained in the *Friedman* case;

(4) that other pertinent decisions of this Court likewise required rejection of plaintiff's argument that the 1959 statute was arbitrary and unreasonably discriminatory in its classification, citing *Grochowiak v. Pennsylvania*, 358 U. S. 47, *Kidd v. Ohio*, 358 U. S. 132, *Guadalupe Chevrolet Motors v. Gassert*, 354 U. S. 933, and *Sigle v. McGee*, 346 U. S. 802;

(5) that the factual circumstances attending enactment of the 1959 statute affirmatively suggest the existence of a rational basis for the legislative action; and

(6) that no basis for a finding of discriminatory enforcement of the 1959 statute exists since